APPENDIX I

"A"

PERTINENT PROVISIONS OF THE EMERGENCY PRICE CONTROL ACT OF 1942, AS AMENDED BY STABILIZATION EXTENSION ACT OF 1944. (50 U.S.C. App. 901 et seq.)

PURPOSES OF ACT. Sec. 1 (a). It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency. . . .

FIXING MAXIMUM RENTS Sec. 2 (b) . . . the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. . . .

EVASION Sec. 2 (g). Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof.

UNLAWFUL CONDUCT Sec. 4 (a). It shall be unlawful, regardless of any contract, agreement, lease or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any

act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to any of the foregoing.

OPA Price Adm. Sec. 201 (d). The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper to carry out the purposes and provisions of this Act.

Treble Damage Actions Sec. 205 (e). If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus . . . (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based, as the court in its discretion may determine. . . . Provided, however, that such amount shall be the amount of the overcharge or overcharges . . ., if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by

which the consideration exceeds the applicable maximum price.

SAVING PROVISIONS. See also Sec. 1 (b) re: Prosecutions and suits. Sec. 206. Any price schedule establishing a maximum price or maximum prices, issued by the Administrator of the Office of Price Administration or the Administrator of the Office of Price Administration and Civilian Supply, prior to the date upon which the Administrator provided for by Section 201 of this Act takes office, shall, from such date, have the same effect as if issued under section 2 of this Act until such price schedule is superseded by action taken pursuant to such section 2. . . . All such price schedules shall be reprinted in the Federal Register within ten days after the date upon which such Administrator takes office.

DEFINITIONS Sec. 302. As used in this Act—

(a) The term "sale" includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. The terms "sell", "selling", "seller", "buy", and "buyer", shall be construed accordingly.

(b) The term "price" means the consideration demanded or received in connection with the sale of a commodity.

(c) The term "commodity" means commodities, articles, products and materials. . . .

(d) The term "defense-rental area" means . . . any area designated by the Administrator as an area where defense activities have resulted or threaten to result in an increase in the rents for housing accommodations inconsistent with the purposes of this Act.

(e) The term "defense-area housing accommodations" means housing accommodations within any defense-rental area.

(f) The term "housing accommodations" means any building, structure, or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes (including houses, apartments, hotels, rooming or boarding house accommodations, and other properties used for living or dwelling purposes) together with all privileges, services, furnishings, furniture, and facilities connected with the use or occupancy of such property.

(g) The term "rent" means the consideration demanded or received in connection with the use or occupancy or the transfer of a lease of any housing accommodations.

(h) The term "person" includes an individual. . . .

(i) The term "maximum price", as applied to prices of commodities means the maximum lawful price for such commodities, and the term "maximum rent" means the maximum lawful rent for the use of defense-area housing accommodations. Maximum prices and maximum rents may be formulated, as the case may be, in terms of prices, rents, margins, commissions, fees, and other charges, and allowances.

"B"

PERTINENT PROVISIONS OF
RENT REGULATION FOR HOUSING (10 F. R. 13528)

Sec. 1 (c). Effect of this Regulation on leases and other rental agreements. The provisions of any lease or other rental agreement shall remain in force pursuant to the terms thereof, except insofar as those provisions are inconsistent with this regulation.

Sec. 1 (d). Waiver of benefit void. An agreement by the tenant to waive the benefit of any provision of this regulation is void. . . .

Section 2. Prohibition against higher than maximum rents.

(a) General prohibition. Regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, no person shall demand or receive any rent for or in connection with use or occupancy on and after the effective date of regulation of any housing accommodations within the Defense-Rental Area higher than the maximum rents provided by this regulation; and no person shall offer, solicit, attempt, or agree to do any of the foregoing. . . .

Section 6 (a). Restrictions on removal of tenant. So long as the tenant continues to pay the rent to which the landlord is entitled, no tenant shall be removed from any housing accommodations, by action to evict or to recover possessions, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession, notwithstanding that such tenant has no lease or that his lease or other rental agreement has expired or otherwise terminated, and regardless of any contract, lease, agreement or obligation heretofore or hereafter entered into which provides for entry of judgment upon the tenant's confession for breach of the covenants thereof or which otherwise provides contrary hereto, unless:

(1) Tenant's refusal to renew lease, or (2) Tenant's refusal of access to landlord; or (3) violating obligation of tenancy or committing nuisance; or (4) Subtenants on expiration of tenant's lease. The tenant's lease or other rental agreement has expired or otherwise terminated, and at the time of termination the occupants of the housing accommodations are subtenants or other persons who occupied under a rental

agreement with the tenant, and no part of the accommodations is used by the tenant as his own dwelling; or (5) revoked; or (6) occupancy by landlord.

Sec. 6 (b). No tenant shall be removed or evicted on grounds other than those stated above unless, on petition of the landlord, the Administrator certifies that the landlord may pursue his remedies in accordance with the requirements of the local law. . . .

Sec. 9 (a) General. The maximum rents and other requirements provided in this regulation shall not be evaded, either directly or indirectly, in connection with the renting or leasing or the transfer of a lease of housing accommodations, by way of absolute or conditional sale, sale with purchase money or other form of mortgage, or sale with option to repurchase, or by modification of the practices relating to payment of commissions or other charges or by modification of the services furnished with housing accommodations, or by tying agreement or otherwise.

(b) Purchase of property as condition of renting. Specifically, but without limitation on the foregoing, no person shall require a tenant or prospective tenant to purchase or agree to purchase furniture or any other property as a condition of renting housing accommodations *unless the prior written consent of the Administrator is obtained.* (Amdt. 67, 9-10-45.) (Italics supplied.)

Section 10. Persons violating any provision of this regulation are subject to criminal penalties, civil enforcement actions and suits for treble damages as provided for by the Act.

Section 13 (6). "Housing accommodations" means any building, structure, or part thereof, or land appurtenant

thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes, together with all privileges, services, furnishings, furniture, equipment, facilities and improvements connected with the use or occupancy of such property.

(8) "Landlord" includes an owner, lessor, sublessor, assignee or other person receiving or entitled to receive rent for the use or occupancy of any housing accommodations, or an agent of any of the foregoing.

(9) "Tenant" includes a subtenant, lessee, sublessee, or other person entitled to the possession or to the use or occupancy of any housing accommodations.

(10) "Rent" means the consideration, including any bonus, benefit, or gratuity, demanded or received for or in connection with the use or occupancy of housing accommodations or for transfer of a lease of such accommodations.

DARK PAGE BLEEDTHRU

APPENDIX II

UNITED STATES OF AMERICA
Southern District of New York } ss.

I, William V. Connell, Clerk of the United States District Court for the Southern District of New York, do hereby certify that the writings annexed to this certificate have been compared with their originals on file and remaining of record in this office; that they are correct transcripts therefrom and of the whole of the said originals.

In Testimony Whereof I have hereunto subscribed my name and affixed the seal of the said Court at the City of New York, in the Southern District of New York, this 1st day of February in the year of our Lord one thousand nine hundred and fifty-two and of the Independence of the United States the One Hundred and Seventy-sixth.

(SEAL) WILLIAM V. CONNELL,
Clerk.

DARK PAGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

United States of America,

Plaintiff,

-against-

Edenor, Inc., Harry Cahn, "John" Grossman, (first name fictitious, true first name unknown to plaintiff, Edward Horrigan, Robert Charters, Gerry Charters, Julius Kanarek and Henry Winauer, and Robert J. Koechlin,

Defendants.

Civil 48-720

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BLEEDTHRU

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LEIBELL, D. J.

The findings of fact in this case cover three transactions, all in the same apartment house, by which three tenants in possession were aided by the owner of the building in tieing-in a sale of their furniture to incoming tenants who were given possession, either under a new lease, as in the case of Klein, or by an assignment of an existing lease, as in the cases of Fitzpatrick and Appleman. Klein was required to pay Charters $2400 for furniture and furnishings which were not worth in excess of $1483.00. Fitzpatrick had to pay Koechlin $2000 for furniture and furnishings worth at the most $1305.00; and Appleman was obliged to pay Horrigan $2800 for furniture and furnishings worth not more than $1785.00.

The Koechlin deal took place November 3-5, 1947. When Koechlin decided to try to sell his furniture in connection with the occupancy of his apartment he had no lease from the owner Edenor, Inc. His old lease at $40.00 a month had expired January 14, 1947 and he continued on as a statutory tenant under the laws of New York. In that situation he had nothing to offer to a new tenant in connection with the sale of his furniture so he obtained from Edenor, Inc. a new lease at $46.00 a month, for the term of October 15, 1947 to December 31, 1948. The lease contained a type-

written clause that Koechlin could "sublease" the apartment at the same rental to a tenant meeting the approval of the landlord. His old lease contained no such provision. The right to sublet was included so that Koechlin could sell his furniture together with an assignment of the lease. This he promptly proceeded to do with the approval of the landlord and after he received a small down payment ($50.00) from Fitzpatrick they went to the landlord and there Koechlin assigned the lease to Fitzpatrick and Fitzpatrick assumed its obligations on November 3, 1947. Two days later at Koechlin's apartment Fitzpatrick paid the balance of $1950 and received from Koechlin the Edenor, Inc. lease and the assignment subscribed thereto by Koechlin. Fitzpatrick took possession and thereafter was recognized as the tenant by Edenor, Inc. Mr. Cahn, the president of Edenor, Inc. and Mr. Grossman, its agent, knew that the sale of the furniture was tied-in with the assignment of the lease and gave their full approval thereto. There is no proof of any actual payment of money to Cahn or Grossman or Edenor, Inc., but all three acted in collusion with Koechlin and aided him in carrying through the sale to Fitzpatrick which called for possession of the apartment as a condition of the payment of the excessive price exacted for the furniture. Without the full cooperation of Edenor, Inc. and its president, Harry Cahn, and its agent, Aaron Grossman, the deal could not have been consummated.

The Charters and Horrigan sales to Klein and Appleman respectively took place within a few days of each other in April 1948. Indeed there is a noticeable similarity in wording between the typewritten clause of the Bill of Sale of the furniture executed by Horrigan on April 25, 1948 and a corresponding paragraph of the Bill of Sale prepared by Charters earlier in April 1948 and executed by him on

April 27, 1948. Grossman, the agent of Edenor, Inc., was very close to both transactions and was present in each case when the new tenant received the Bill of Sale of the furniture.

The written lease Charters had received from Edenor, Inc. in November 1945 had expired about December 15, 1946. Thereafter Charters was only a statutory tenant at the old rental of $56 a month. He had nothing in the nature of a right of occupancy which he could assign to any incoming tenant. In order to sell his furniture attached to any right to occupy the apartment, Charters had to have the aid of the landlord, Edenor, Inc. This he arranged through Grossman, the agent of the landlord, and as part of the arrangement the landlord agreed to give an acceptible new tenant a lease at a 15% increase in rental.

Klein needed an apartment desperately. He even hired a real estate agent to find him one and paid the agent (Kanarek and Winauer) a fee of $200.00 for finding the Charters apartment, which Charters had advertised in a newspaper. Possession of the apartment was to go with the sale of the furniture. Klein paid $500.00 in cash, on account of the purchase price of $2400.00 about April 21st. This was before Klein saw Grossman or Cahn. Later Cahn approved of Klein as a tenant. On April 26, 1948, Edenor, Inc. executed a lease to Klein at $57.50 a month for a term expiring December 31, 1949. On April 27, 1948, Klein paid Charters the balance of $1900.00 and they then went to Grossman's office where Klein was given the lease by Grossman and was also given the Bill of Sale of the furniture. The sales price of the furniture was excessive. The tie-in of the sale of the furniture to Klein was accomplished by the joint and collusive acts of Charters, Cahn, Grossman and Edenor, Inc. Although Klein testified that Charters

said he had to give Grossman $500.00 of the amount paid for the furniture there is no proof of the actual payment.

Horrigan's sale of the furniture of his apartment to Appleman was also accomplished with the aid and collusion of Edenor, Inc., Cahn and Grossman. In November 1945 Mrs. Horrigan had obtained a one year's lease which expired December 15, 1947. The rental was $38.00 a month. When it expired she continued on as a statutory tenant. On August 29, 1947 she obtained a new lease for a term expiring September 14th, 1949 at an increase in rental of 15%. The lease did not contain any assignment clause. Early in April 1948, because of the death of her father, she and her husband decided to move in with her mother who had a six room apartment in another part of the Bronx. Through Grossman it was arranged that Edenor, Inc. would consent to an assignment of the Horrigan lease of Apartment C at 2805 University Avenue. Mrs. Horrigan thereupon advertised her three room apartment "lease $43; furniture $2,800; subject OHE approval". The last clause about the OHE approval was added by the newspaper before it would accept the advertisement.

The Applemans were also desperately in need of an apartment. They read the advertisement and by appointment saw the apartment. They could not get the Horrigans to reduce the price so they agreed to pay the $2800. An appointment was then made through Grossman for the Applemans and the Horrigans to see Mr. Cahn, the president of Edenor, Inc. At Mr. Cahn's office on April 22, 1948, Mrs. Horrigan assigned her lease to Appleman with the written approval of Edenor, Inc. and Appleman assumed in writing the performance of the terms of the lease. Appleman did not get any copy of the lease or assignment at that time. An appointment was made for April 25th at

the Horrigan apartment. There Appleman paid the $2800 to Horrigan who delivered a bill of sale of the furniture and Grossman delivered to Appleman the lease with the Horrigan assignment and the approval of the landlord subscribed thereto.

Horrigan could not have sold the furniture together with the assignment of the lease without the cooperation of the landlord, Edenor, Inc. and of Cahn and Grossman. The whole deal, the assignment of the lease and the sale of the furniture, was the result of the action collusively taken by the Horrigans, Edenor, Cahn and Grossman. Cahn knew all about the sale of the furniture. Grossman helped consummate it. The tie in of the sale of the furniture to the assignment of the lease was the result of their joint acts. It was a single deal.

The furniture in each instance was, at the time of the sale, worth about one-third less than its original cost figure asserted by the defendants who owned the furniture. Any amount paid in excess of about two-thirds of this claimed original cost was excess rent. In the Charters-Klein sale the original cost of the furniture was $2,224.43 and at the time of the sale to Klein this furniture had a fair market value of $1,483.00. The $2,400.00 paid as the "purchase price" for the furniture thus represented an excess rent overcharge of $917.00 in this instance. In the Koechlin-Fitzpatrick sale the original cost of the furniture was $1,957.00 and at the time of the sale to Fitzpatrick this furniture had a fair market value of $1,305.00. The $2,000.00 paid as the "purchase price" by Fitzpatrick for the furniture thus represented an excess rent overcharge of $695.00. In the Horrigan-Appleman sale the original cost of the furniture was $2,636.32 and at the time of the sale to Appleman this furniture had a fair market value of $1,758.00. The $2,800.00 paid as the "purchase price" for the

furniture thus represented an excess rent overcharge of $1,042.00.

It was the clear intent and purpose of the Federal Housing Regulations to prevent transactions by which a prospective tenant could be forced to buy furniture in order to obtain housing accommodations. So that the Housing Expediter might examine any such deals in advance of their consummation the Regulations required his prior approval thereof so that a prospective tenant could not under the guise of a purchase of furniture at an excessive price be required to pay something in addition to the registered rent of the housing accommodations.

The Statute and Regulations.

The following are in pertinent part the Statutes and Regulations relevant to this case:

The Housing and Rent Act, Section 206(b).

(b) Whenever in the judgment of the Housing Expediter any person has engaged in or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act, or any regulation or order issued thereunder, the United States may make application to any Federal, State, or Territorial Court of competent jurisdiction for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing that such person has engaged or is about to engage in any such acts or practices, a permanent or temporary injunction, restraining order, or other order shall be granted without bond."

Section 204(d).

"The Housing Expediter is authorized to issue such regulations and orders, consistent with the provisions of this title, as he may deem necessary to carry out the provisions of this section and section 202(c)."

NEW YORK CITY CONTROLLED HOUSING RENT REGULATIONS, OCTOBER OF 1947, AS AMENDED.

Section 8—EVASION

"(b) *Purchase of property as condition of renting.* Specifically, but without limitation on the foregoing, no *person* shall require a tenant or prospective tenant to purchase furniture or any other property as a condition of renting housing accommodations unless the prior written consent of the Expediter is obtained."

DEFINITION OF RENT.

Section 1.

"'Rent' means the consideration, including any bonus, benefit or gratuity demanded or received for, or in connection with the use or occupancy of housing accommodations or the transfer of a lease of such accommodations."

Section 2.

"PROHIBITION AGAINST HIGHER THAN MAXIMUM RENTS—(a) *General Prohibition.* Regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, no *person* shall offer, demand or receive any rent for or in connection with the use or occupancy on and after the effective date of this regulation of any housing accommodations within the defense rental area higher than the maximum rents provided by this regulation; and no person shall offer, solicit, attempt or agree to do any of the foregoing. A reduction in the services, furniture, furnishings or equipment required under Section 3 of this regulation shall constitute an acceptance of rent higher than the maximum rent. Lower rents than those provided by this regulation may be demanded or received."

Section 8(b) is not limited to landlords who are owners of the building or have a lease with an unconditional right of assignment and who attach a tie-in sale of furniture to the leasing of premises. The prohibition of the section is broader than that. It says "no person" shall do so. That would include a tenant working in collusion with a land-

lord, the furniture being the property of the tenant whose occupancy of the premises the purchaser of the furniture acquires through the collusive cooperation of the landlord, who knows of the tie-in sale and who gives to the incoming tenant a new lease or gives his consent to an assignment of the tenant's lease. Any other interpretation of the regulation would be destructive of its purpose and create a loophole through which deals such as those collusively accomplished by the parties now before the Court could escape.

Nor is it necessary to show the payment of anything of value to the landlord. In the case at bar, as part of the arrangement the landlord received a permissible 15% increase in rent in the Charters and Koechlin deals. He could have received that legally from any new tenant. However he knew of the tie-in sale of the furniture and because some act on his part was required to make the tie-in sale a part of the rental to the new tenant the deal is illegal, and the landlord and the selling tenant should both be held for the excessive amount exacted for the sale of the furniture. It is excess rent required as a condition of the renting even though the landlord himself may not have received any part of it. Although I have a strong suspicion that the landlord's cooperation was not given gratuitously there was no direct proof of any actual payment to the landlord.

The plaintiff is entitled to a decree containing the injunctive relief sought together with a provision ordering those who were involved in each illegal transaction to pay over to the plaintiff the excess in the price exacted on the sale of the furniture at the time of the sale. *Porter* v. *Warner Holding Co.*, 328 U. S. 395; *Small* v. *Schultz*, 173 F. 2d 940. *Woods* v. *William A. White & Sons*, 172 F. 2d 356, which considered real estate agents' commissions and not tie-in sales of furniture, is not to the contrary. The same is true of *Auerback* v. *Fleming*, 161 F. 2d 207.

Findings of Fact and Conclusions of Law have already been filed herein. The following paragraphs are quoted from the Conclusions of Law:

> "IV. The plaintiff is entitled to a decree enjoining the defendants, Edward Horrigan, Robert Charters, Gerry Charters, Robert J. Koechlin, Edenor, Inc., Harry Cahn and Aaron Grossman, from violating the Housing and Rent Act of 1947, as amended, and the Regulations issued pursuant thereto."
>
> "V. The plaintiff is entitled to a decree containing a provision—
>
> (a) ordering the defendants, Edenor, Inc., Harry Cahn, Aaron Grossman and Robert Charters and Gerry Charters to refund to Joseph N. Klein the sum of $917.00;
>
> (b) ordering the defendants, Edenor, Inc., Harry Cahn, Aaron Grossman and Robert J. Koechlin, to refund to Patrick Fitzpatrick the sum of $695.00; and
>
> (c) ordering the defendants, Edenor, Inc., Harry Cahn, Aaron Grossman and Edward Horrigan to refund to Herman G. Appleman the sum of $1042.00; said refunds to be made by payment thereof to the plaintiff."
>
> "Let a decree and judgment be entered as hereinabove provided, together with the costs of this action to be taxed against the defendants."

Settle a decree accordingly.

aDted, May 22nd, 1950.

VINCENT L. LEIBELL,

Dated, May 22nd, 1950.

DARK PAGE BLEEDTHRU

Office - Supreme Court, U. S.
FILED
APR 15 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951

No. 594

PAUL D. LYNCH,
Petitioner,

vs.

HOWARD J. GRUBER and ISABEL GRUBER,
husband and wife,
Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

HUGH M. MATCHETT,
DAVID F. MATCHETT, JR.,
WALTER F. DODD,
Chicago, Ill.

NED HALL,
Vancouver, Wash.

FRANK S. KETCHAM,
Washington, D. C.,
Counsel for Petitioner.

Dated: Chicago, Ill., April 10, 1952.

BARNARD & MILLER, 33 S. Market St., Chicago 6. FRanklin 2-0543

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1951

No. 584

PAUL D. LYNCH,
Petitioner,

vs.

HOWARD J. GRUBER and ISABEL GRUBER,
husband and wife,
Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioner, Paul D. Lynch, respectfully prays that the Court grant a rehearing of the order entered March 31st, 1952, denying his petition for writ of certiorari to review a final judgment of the Supreme Court of the State of Washington (Rec. 150). There are substantial grounds available to petitioner although not previously presented which justify such action.

I.

JURISDICTION.

In the first place it is possible that this Court denied the petition for writ of certiorari on the ground petitioner did not affirmatively show in his original petition that this Court had jurisdiction to review the case this Court having held in *Gorman* v. *Washington University*, 316 U.S. 98, 101, 62 S. Ct. 962, 89 L. Ed. 1293, that where a state court decides a case in division that the court *en banc* is the highest court of the state in which a decision could be had within the meaning of the jurisdictional statute and if it does not affirmatively appear petitioner "made application" as he "could have done" "to transfer the cause to the court for full review" the Supreme Court of the United States has no jurisdiction to review the case, the decision of the Supreme Court of Washington in the instant case having been rendered by Department Two of that Court and not by the Court sitting *en banc* (Rec. 132) and petitioner in his original petition (Jurisdiction, page 2) not having negatived that the case was susceptible of review by the full court sitting *en banc*.

The following statement includes facts previously omitted which negative that the case was susceptible of review by the Supreme Court of Washington sitting *en banc*.

The opinion of the Supreme Court of Washington was rendered and filed August 5th, 1951, by Department Two of that court (Rec. 132). A petition for rehearing was filed September 7th, 1951 (Rec. 134) stating "Appellant prays that if this petition for rehearing be granted that the court hear and determine the case *en banc*" (Rec. 134). The petition for rehearing was denied October 3rd, 1951 (Rec. 150), and judgment was entered on that date (Rec. 150). Time

for filing a petition for writ of certiorari, which would otherwise have expired January 2nd, 1952, was extended to and including February 15th, 1952, by order of Mr. Justice Douglas dated December 20th, 1951 (Rec. 154).

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

An examination of the Rules of Court of the Supreme Court of Washington, 34a Wn 2d 5, reveals that no litigant has any right to demand that his cause be heard by the court *en banc* and that any request for such hearing is directed to the discretion of the court. Rule 4 provides "Hearing *en banc* • • • may be set by the court *in its discretion* at such other times *as the court may order*." (Italics ours.) (34a Wn 2d 5). Rule 6 provides: "Each of the departments shall have the power to hear and determine causes and all questions arising therein, subject to the provisions in relation to the court *en banc*." (34a Wn 2d 5). Rule 7 provides: "The Chief Justice shall from time to time apportion the business of the departments, and may, *in his discretion* [italics ours], before a decision is filed in the office of the clerk, order any cause pending before the court to be heard and determined by the court *en banc*. Any four judges, at any time before the filing of a decision in the office of the clerk by a department, may order a cause to be heard *en banc*." (34a Wn 2d 5). Rule 15 provides: "The Chief Justice, or any four judges, may convene the court *en banc* at any time, and the Chief Justice shall be the presiding judge of the court when so convened • • • and every decision of the court whether rendered *en banc* or by a department shall be final thirty days after its filing, unless during such period a petition for rehearing be filed. The filing of such petition within such period shall have the effect of suspending the decision until disposed of by the concurrence of five judges: • • • Whenever

a decision shall become final as herein provided, a judgment shall issue thereon." (34a Wn 2d 7-8).

The order denying the petition for rehearing is signed by "F. W. Schwellenbach, Chief Justice" (Rec. 150) and in the light of Rule 15 just quoted is apparently the action of the full court.

Petitioner exhausted his remedies in the State of Washington and this Court has jurisdiction to review the case. The holding in *Gorman* v. *Washington University*, 316 U.S. 98, 101, 62 S. Ct. 962, 89 L. Ed. 1293 has no application.

II.

FINDINGS OF FACT.

In the second place it is possible that this Court denied the petition for writ of certiorari on the basis of the general rule that findings of fact by state courts will not be re-examined. The answer to that position is that the decision which this court is asked to review is the decision of the Supreme Court of Washington and that court made no findings of fact and did not concur in any finding of fact by the trial court but affirmed solely on the ground petitioner had not shown that a common law relationship of landlord and tenant existed between respondents and himself (Rec. 134) which is admitted. If the findings made by the trial court are to be considered this Court "will review the findings of facts by a state court * * * where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts" (*Fiske* v. *Kansas*, 274 U.S. 380, 385-386; *United Gas Public Service Co.* v. *Texas*, 303 U.S. 123, 143; *Aetna Life Insurance Co.* v. *Dunken*, 266 U.S. 389, 394), and will

"reverse findings of fact by a trial court where 'clearly erroneous' " (*United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395), a finding being " 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been commtited." Here the facts and conclusions of law are intermingled and a mistake has definitely been committed.

III.

BASIC ISSUE—NATIONAL SUPREMACY.

In the third place the Court may have denied the petition for writ of certiorari on the ground that the immediate point in issue, i.e., whether it is or is not necessary for petitioner to establish that a common law relationship of landlord and tenant existed between respondents and himself in order for him to maintain an action and secure a judgment under the Emergency Price Control Act of 1942 (50 U.S.C. App. 901, *et seq.*), is not a matter of vital importance to the country as a whole or of great significance in the development of Federal jurisprudence although petitioner believes that it is.

But that question is insignificant in comparison with the real issue in this litigation: i.e., whether the Supreme Court of the United States can afford to permit a State through its judicial department to refuse to enforce a Federal law and regulation as written without doing something about it. If it was necessary for a writ of certiorari to issue in *Garrett* v. *Moore-McCormack*, 63 S. Ct. 246, 317 U.S. 239, it should issue in this case.

CONCLUSION.

For the foregoing reasons this petition for rehearing should be allowed and for the reasons stated in the petition for writ of certiorari the Court should order a writ of certiorari to issue in this case.

Respectfully submitted,

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